IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 21, 2007

STATE OF TENNESSEE v. JAMES C. OSBORNE, III

Appeal from the Criminal Court for Wilson County
No. 04-1141 J. O. Bond, Judge

No. M2006-01307-CCA-R3-CD - September 4, 2007

The defendant, James C. Osborne, III, was convicted of attempted aggravated child neglect, a Class C felony, and child neglect, a Class A misdemeanor, by a Wilson County Criminal Court jury. See T.C.A. §§ 39-12-101 (attempt); 39-15-402 (2004) (amended 2005) (aggravated child neglect); 39-15-401 (2004) (amended 2005, 2006) (child neglect). The defendant was sentenced to six years in the Department of Correction as a Range I, standard offender for the felony conviction and eleven months and twenty-nine days in the county jail for the misdemeanor conviction. The sentences were imposed consecutively. In this appeal, the defendant challenges the length of the effective six-year, eleven month, and twenty-nine day sentence. We hold that the trial court arrived at the proper sentences and affirm its judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and J.C. MCLIN, JJ., joined.

J. Robert Hamilton, Lebanon, Tennessee, for the appellant, James C. Osborne, III.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Jason Lee Lawson and Howard Lee Chambers, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The defendant was tried with his wife, Christine Osborne, relative to their conduct toward the defendant's mentally retarded son, who is Mrs. Osborne's stepson. The evidence showed that the victim, who was fifteen years old at the time of the offenses, was chained to a bed in the home in which he lived with the defendants for long periods of time. The victim was also malnourished, weighing in the range of forty-nine to sixty pounds and measuring fifty-three inches tall. The victim's mistreatment came to light when Mrs. Osborne's sister, who had recently been living in the

Osborne home with her boyfriend and five children, reported the conditions to the Department of Children's Services.

The defendant worked during the day as a truck driver. Mrs. Osborne was a homemaker and was the primary caretaker of the victim as well as her three children fathered by the defendant, all of whom lived in the Osborne home. The victim had health concerns because he received a heart transplant as an infant, which required that he take immunosuppressive medications. He was on a low sodium diet. The victim also had serious dental issues which required extensive dental work under general anesthesia after the crimes were discovered. There was evidence that the victim was not allowed by Ms. Osborne to eat the same foods as the other members of the family and that the victim was given soup and water as his primary means of nourishment, although there was also evidence that the victim was allowed at times to have other foods. There was evidence that Mrs. Osborne limited the victim's diet to soup because of his poor dental health. When the authorities went to the Osborne home, there was plenty of food in the home, and no one else in the family, including the three other children, appeared malnourished. The victim's diet was a source of contention between the defendant and Mrs. Osborne, and the defendant sometimes provided food to the victim in a clandestine manner in order to avoid conflict with Mrs. Osborne. Mrs. Osborne took the victim to his doctor appointments and communicated with school personnel about the victim. The victim's school attendance was sporadic, and he had never returned to school following a suspension.

On several occasions, the victim left the house in the middle of the night and went to WalMart, where he stole food and other items. After this behavior continued despite Mrs. Osborne sleeping by the door, Mrs. Osborne and the defendant began chaining the defendant to the bed frame to restrain him. This would confine the victim to the wood floor next to the bed for long periods of time. Sometimes the victim was clothed only in a "pullup" diaper. Mrs. Osborne was usually the one who chained the victim, although the defendant bought the chains, had a key to the locks on the chain, and would sometimes release the victim to go to the bathroom and then reapply the chain. The victim was not always allowed to go to the bathroom when he was chained, and at times he would urinate or soil himself and be left in that condition for long periods of time. The victim was sometimes given a "kindergarten mat" on which to sleep on the floor, and he was not the only child who regularly slept on the floor in the two-bedroom home. The mat was taken from the victim as punishment if he urinated or soiled himself. Mrs. Osborne sometimes gave the victim very hot or very cold showers when he had "accidents" and then required him to stand naked in front of an air conditioner for thirty to forty-five minutes. Mrs. Osborne also hit the victim at times.

The victim had some behavioral issues. There was evidence that the victim had hidden a kitchen knife and wanted to kill Mrs. Osborne and the defendant. On one occasion, Mrs. Osborne had awakened to find him standing over her with a knife. The victim had exhibited other troubling behavior in the past, including stealing, throwing a toddler, and drowning a kitten, although the victim claimed the drowning was accidental. Despite these challenges, Mrs. Osborne did not want to have the victim removed from the home because the family would no longer receive his Social Security check.

The evidence against the defendant and Mrs. Osborne was provided by law enforcement officers, Department of Children's Services and school officials, the victim's physicians, the victim, and Mrs. Osborne's sister. Neither the defendant nor Mrs. Osborne testified, although both made statements to the police. The defendant admitted in his statement that his wife had been chaining the victim to the bed and had not been feeding the victim properly. The defendant led the authorities to the chains and locks that were used to restrain the victim and provided his key to the locks. The defendant said he knew the situation would eventually be discovered and expressed relief that it was discovered. The defendant told the authorities that he acquiesced in the victim being chained and underfed to avoid conflict with Mrs. Osborne. The defendant incorrectly identified the school the victim attended. He said Mrs. Osborne told him that a law enforcement officer, a teacher, and friends had all told her that it was acceptable to chain the victim at night.

The defense attempted to portray the defendant and Mrs. Osborne as concerned, albeit misguided, parents who had done the best they could in a challenging situation. There was evidence that Mrs. Osborne took the victim to medical appointments, gave him his medications, and communicated frequently with school personnel about him. There was evidence that Mrs. Osborne had expressed concern to a physician about the victim's poor growth and that it was not unusual for pediatric heart transplant recipients to be smaller than their peers.

The defendant claims on appeal that he was improperly given a maximum sentence for his felony conviction and consecutive sentences. We begin our sentencing review with a summary of the evidence presented at the sentencing hearing.

The defendant's presentence report reflects that the defendant, in his forties, had seven petit larceny convictions, received at age eighteen. He had dropped out of school in the tenth grade to work, and he had a history of steady employment. He was in the process of divorcing Mrs. Osborne. He had four minor children, one of whom was the victim, and two adult children. The defendant wrote a letter to the officer who prepared the presentence report in which he apologized for the victim's ordeal and "that my other three children have had to go through what they have had to go through." A letter from the victim's psychologist that was attached to the presentence report said that the victim was fearful of retaliation from the defendant and Mrs. Osborne, that he suffered post-traumatic stress disorder and dissociative identity disorder as a result of the abuse, that the victim had a difficult time understanding that he was not at fault for the abuse, and that the victim would need psychological treatment for the rest of his life.

Kelly Morris testified that she prepared the defendant's and Mrs. Osborne's presentence reports. She said she learned in her investigation that the defendant's and Mrs. Osborne's three minor children witnessed the victim's mistreatment. She said she received reports that the defendant was a good and reliable employee and that he was well liked by neighborhood children. She said she received other reports of the high regard in which individuals held the defendant. She read a portion of a letter into the record in which the victim professed to love the defendant.

Gloria Daily testified that she had known the Osbornes for about two years and that the defendant had been her son's "ball coach." She said that in her opinion, the defendant was a good and honest person and that he had been a positive role model to her son and daughter. She said her son had spent the night at the Osborne home.

When a defendant appeals the length or manner of service of a sentence imposed by the trial court, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d).[1] However, the presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is on the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d), Sent'g Comm'n Cmts. This means if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168.

Length of Felony Sentence

The record reflects that in determining the length of the defendant's felony sentence, the trial court considered the statutory aggravating circumstances, and at least to the extent that it announced its summary rejection of the mitigating circumstances, considered them as well. However, the record does not reflect that the court considered the principles of sentencing as required by the statute. In addition, the court failed to make any findings relative to its consecutive sentencing determination. Thus, our review of the length and consecutive imposition of the defendant's sentences is not accompanied by a presumption of correctness.

The state argued that the following statutory enhancement factors as listed in Tennessee Code Annotated section 40-35-114 (2003) (amended 2005) applied to the defendant:

[1] We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal. The defendant was sentenced after the change in the sentencing laws took effect, but the record does not reflect that the defendant signed a waiver of his ex post facto protections to be sentenced under the amended provisions. See T.C.A. § 40-35-210, Compiler's Notes.

. . .

(2) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(3) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;

(4) The offense involved more than one (1) victim;

(5) The victim of the offense was particularly vulnerable because of age or physical or mental disability, including, but not limited to, a situation where the defendant delivered or sold a controlled substance to a minor within one thousand feet (1,000') of a public playground, public swimming pool, youth center, video arcade, low income housing project, or church;

(6) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(7) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

. . .

(11) The defendant had no hesitation about committing a crime when the risk to human life was high;

. . .

(13) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death or serious bodily injury to a victim or a person other than the intended victim;

. . .

(16) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense[.]

The defendant submitted, and the trial court summarily rejected, the following statutory mitigating factors as listed in Tennessee Code Annotated section 40-35-114:

> (3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
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> . . .
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> (9) The defendant assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses;
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> . . .
>
> (11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct;
>
> (12) The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person is not sufficient to constitute a defense to the crime[.]

The defendant also submitted the following mitigating factors, which are classified under the "catch-all" provision of section 40-35-114(13):

> (1) The defendant played a lesser role in the commission of the offense;
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> (2) The defendant has a history of stable employment, including after his release on bond;
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> (3) The defendant has taken a parenting class and attended counseling since his arrest;
>
> (4) The defendant has maintained stable housing since his release on bond;
>
> (5) The victim still professed to love the defendant "a lot";
>
> (6) The defendant has filed for divorce from Mrs. Osborne.

The defendant did not raise in the trial court, and has not raised on appeal, the application of Blakely v. Washington, 542 U.S. 296 (2004), in determining the extent to which the defendant's

felony sentence may be enhanced above the presumptive minimum sentence. Blakely limits the bases for judicial sentence enhancement, other than when based upon prior convictions, to those facts which are either found by a jury or admitted by a defendant. Blakely, 542 U.S. at 303-04; see Apprendi v. New Jersey, 530 U.S. 466, 488 (2000). In the present case, it is not necessary for us to examine the Blakely issue in detail because the defendant's history of seven petit larceny convictions is a sufficiently egregious criminal history to justify enhancement of the defendant's sentence to the maximum term for a Range I offender, six years.

The question remains whether the defendant should receive any mitigation of that sentence. We reject the defendant's bid for mitigation based upon his assistance to authorities. The evidence reflects that the defendant was truthful with authorities and provided them with the chains and locks, but by the time he did so, the authorities already had received evidence against him and Mrs. Osborne from several sources. Likewise, we reject that the defendant did not have a sustained intent to violate the law. The evidence is otherwise, given that the victim had been chained and underfed for an extended period of time. The defendant was aware of this and was complicit in its continuation. We likewise reject that the defendant acted under duress or domination of another person. The evidence was that he did not want to have conflict with Mrs. Osborne. However, his own desire to avoid unpleasantness to himself is not a sufficient basis for mitigation. We reject that the defendant played a lesser role in the offense. He allowed Mrs. Osborne to be the primary caregiver to the victim despite his knowledge of how the victim was being mistreated. In addition, the defendant acceded to Mrs. Osborne's demands that the victim not be fed, and he rechained the victim after releasing the victim to use the bathroom. The defendant was the one who purchased the chains. The defendant is not entitled to mitigation because the victim still loves him. The information at the sentencing hearing reflected that the victim had conflicting feelings and was fearful of the defendant. We afford no mitigation to the defendant for his initiation of divorce proceedings. The state provided information to the court at sentencing that the defendant visited Mrs. Osborne in prison each time she was allowed to have visitors. We reject mitigation based upon the defendant's "stable housing." There was no proof of the defendant's stable housing situation, and the defendant has not explained why that factor should be applicable.

On the other hand, we are able to afford the defendant slight mitigation for his stable work history. However, his absence from home allowed Mrs. Osborne to abuse the victim, which the defendant knew was occurring. We likewise recognize his attendance at parenting classes and counseling, although it is entitled to slight consideration given that it was too late to be of any benefit to the victim.

We hold that the trial court properly arrived at a maximum, six-year sentence. The defendant's prior criminal record is entitled to sufficient weight to support a six-year sentence, and the mitigating proof is too slight to provide any effective counterbalance.

Consecutive Sentencing

The other issue is whether the defendant was properly sentenced to serve his felony and misdemeanor sentences consecutively. Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the court may order sentences to run consecutively it if finds by a preponderance of evidence "[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high[.]" T.C.A. § 40-35-115(b)(4). For dangerous offenders, "consecutive sentences cannot be imposed unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995); see State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure requires that the trial court "specifically recite the reasons" behind its imposition of a consecutive sentence. See State v. Donnie Thompson, No. M2002-01499-CCA-R3-CD, Maury County, slip op. at 5 (Tenn. Crim. App. Mar. 3, 2003) (reversing the trial court's imposition of consecutive sentencing because it failed to make a finding under Tennessee Code Annotated section 40-35-115(b) and the record did not support a conclusion that the defendant met the consecutive sentencing prerequisites).

We hold that the defendant is a "dangerous offender." T.C.A. § 40-35-114(b)(4). We also hold that consecutive sentences are reasonably related to the severity of these offenses and are necessary to protect the public from further criminal conduct from the defendant. The defendant mistreated the victim and did nothing to stop his wife's mistreatment of the victim. The defendant preferred to avoid conflict with Mrs. Osborne over ensuring the health and well-being of his disabled child. The period of time over which the victim was mistreated was protracted. There was evidence at the sentencing hearing that the victim feared retaliation from the defendant and Mrs. Osborne. The defendant has other minor children, younger than the victim, who witnessed the mistreatment of the victim. A written statement from the defendant's sister, who was the caretaker of these children, reported that these children were suffering effects and feelings of "how they were treated." There was also evidence that Mrs. Osborne had physically assaulted the defendant's older daughter and the defendant's granddaughter while they were living in the defendant's and Mrs. Osborne's home.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE